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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1640

EMMETT C. WORLEY, ... Petitioner,

v.

COLUMBIA GAS OF KENTUCKY, INC.,
KENTUCKY GAS TRANSMISSION CORP.,
MUTUAL PIPELINE CONTRACTORS, INC.,
JOHN T. DIX and
CHESTER NOWICKE. ..... Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF MUTUAL PIPELINE CONTRACTORS, INC., JOHN T. DIX AND CHESTER NOWICKE, THREE OF THE RESPONDENTS

MAY IT PLEASE THE COURT:

The Respondents, Mutual Pipeline Contractors, Inc., John T. Dix and Chester Nowicke, respectfully pray that this Court deny Petitioner's Petition for a Writ of Certiorari.

OPINION BELOW

The opinion delivered by the Court of Appeals, Sixth Circuit, including the Court's opinion and order denying the Petition for Rehearing, and its order denying plaintiff's motion to amend complaint, is reported at 491 F.2d 256; and appears at pages 1a through 23a of the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1973. Rehearing was denied on February 1, 1974. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1). Petitioner's Petition for Writ of Certiorari was docketed by the Clerk of this Court on May 1, 1974.

THE QUESTIONS PRESENTED

The Petitioner does not set forth the questions presented for review but we assume, from the headings under his "Reasons For Granting the Writ" or Argument, that he intends to present the following questions:

I. Whether the Petitioner was deprived of his Seventh Amendment right to a jury trial when the jury's verdict was reversed by the Court of Appeals?

II. Whether the opinion of the Court of Appeals was based upon an incomplete record?

III. Whether the opinion of the Court of Appeals departed from the accepted and usual course of judicial

proceedings or was in conflict with its own previous decisions?

These Respondents maintain that these questions should clearly be answered in the negative and that they present no important questions of federal law.

CONSTITUTIONAL PROVISIONS

This case involves no constitutional provisions, treaties, statutes, ordinances or regulations. It is these Respondents' contention that none of the considerations governing review on certiorari, such as set forth in U.S. Sup. Ct. Rule 19(1)(b) or otherwise, are present in this case. The Petitioner's Petition, however, asserts (at pages 8-10) that he was deprived of his right to jury trial as guaranteed under the Seventh Amendment to the Constitution of the United States. The Seventh Amendment provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Petitioner, in his Table of Authorities (at page iii) also quotes the Eighth Amendment but no specific or relevant argument is presented thereafter.

STATEMENT OF THE CASE

Petitioner instituted his civil action against all Respondents in the United States District Court for the Eastern District of Kentucky. The jurisdiction of the District Court was based upon diversity of citizenship.

The question presented to the District Court and on appeal to the Court of Appeals, Sixth Circuit, was whether the evidence was sufficient to support a finding of a conspiracy on the part of the Respondents to maliciously prosecute the Petitioner.

These Respondents, at trial and on appeal, raised the four contentions enumerated by Circuit Judge Weick in the Court's opinion (491 F.2d at 261 and at page 10(a) of the Appendix to the Petition):

> "First, the defendants contend that Worley failed to show that they were the proximate and efficient cause of the prosecution. Second, they contend that Worley has failed to show that the prosecution, which allegedly caused his damages, had been terminated in his favor. Third, even assuming the first two arguments as rejected, it is asserted that Worley failed to show a lack of probable cause for his prosecution. Fourth, the defendants contend that advice of counsel is an absolute bar to a malicious prosecution action."

The Court's opinion accurately and completely recited all of the facts material to a consideration of these questions. The marshaling of these facts led the Court to the inevitable conclusion that the Peti-

tioner had failed to prove any of the elements requisite to a cause of action for malicious prosecution. The Court did not have to reach the fifth question, namely, whether the verdict was excessive and a result of passion and prejudice, misconduct of counsel and the admission of incompetent evidence. The judgment of the District Court was reversed and remanded with instructions to dismiss the Complaint.

These Respondents hereby adopt Judge Weick's statement of the case which appears at 491 F.2d at 258-263 and at pages 3a-16a of the Appendix to the Petition.

ARGUMENT

I

COURTS DO NOT DEPRIVE ONE OF HIS RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN A MOTION FOR A DIRECTED VERDICT AND A MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ARE OVERRULED AND SUCH RULING IS REVERSED ON APPEAL; FURTHERMORE, THE SIXTH CIRCUIT PROPERLY RULED ON THE FACTS

Petitioner argues that he was deprived of his Seventh Amendment right to a jury trial when the jury's verdict was reversed. In effect, this argument must mean either that a circuit court cannot reverse a district court's refusal to grant a directed verdict or a judgment notwithstanding the verdict or that the

Sixth Circuit applied the wrong standard in so doing. If Petitioner relies on the lack of power argument he must be asking the Supreme Court to overrule Rule 50 of the Federal Rules of Civil Procedure and well-established cases such as *Galloway* v. *United States,* 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943), where the Supreme Court, speaking through Mr. Justice Rutledge, ruled:

> "If the intention is to claim generally that the amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U.S. 450. The objection therefore comes too late."

319 U.S. at 389, 63 S. Ct. at 1086, 87 L. Ed. at 1470. Furthermore, the Supreme Court has held in *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967), that a circuit court may properly reverse a district court's denial of a motion for a judgment notwithstanding the verdict and direct a verdict for the defendant. The Court, speaking through Mr. Justice White, stated:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* * * * Likewise, the statutory

> grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal."

386 U.S. at 322, 87 S.Ct. at 1076, 18 L.Ed. 2d at ——

Therefore, it would seem the Petitioner is limited to the argument that the Sixth Circuit applied the wrong standard. Petitioner, in fact, asserts the proper standard is set forth in *Lynn* v. *Smith,* 281 F.2d 501 (3rd Cir., 1960) and he quotes from that opinion:

> "Thus it is for the jury to determine whether the party has fairly and fully communicated to his counsel the facts within his knowledge, and used reasonable diligence to ascertain the truth, as also whether he acted in good faith upon the advice received from counsel."

Id. at 505. However, this is misleading in two regards. First, the Third Circuit recognizes that these are not issues for the jury *except* when the good faith and full disclosure are *disputed*. *Id.* at 505. The most important distinction, though, is that the Third Circuit was applying Pennsylvania law, as that court explains throughout its opinion. In *Lynn* v. *Smith,* supra, as well as in the present case, jurisdiction is based on diversity of citizenship and so the law of the forum state is controlling. *Id.* at 504. Therefore, in a case tried in the District Court for the Eastern District of Kentucky the law of Kentucky applies and it has been most aptly expressed by the Kentucky Court of Appeals. In *Puckett* v. *Clark,* 410 S.W.2d 154 (Ky., 1966), the highest court in Kentucky affirmed the trial court which had ruled there was no probable

cause based on the advice of counsel and rendered a judgment *n.o.v.* in favor of the defendants. The Kentucky court explained:

> "* * * since public policy favors the exposure of crime, and malicious prosecution actions are not favored in the law, a plaintiff has the burden of making a *clear showing* of no probable cause."

Id. at 157. The Sixth Circuit clearly recognized the Kentucky standard when it cited *Puckett* v. *Clark*, supra, and other Kentucky cases (491 F.2d at 263 and at page 15a of the Appendix to the Petition).

Since the Third Circuit was applying Pennsylvania law in *Lynn* v. *Smith*, supra, at 504, and the Sixth Circuit was applying Kentucky law, and because the result under either ruling depends on the peculiar facts of the case, it follows that the decision in the instant case is not in conflict with any decision of another court of appeals. In this respect the Sixth Circuit has carefully followed Kentucky law. Further, it does not appear that the Sixth Circuit has decided a question of law not previously decided by the Supreme Court or has in any way departed from the usual course of judicial proceedings. It would, therefore, appear the Petitioner has stated no reason for the Supreme Court to grant certiorari.

II

THE RECORD IN THIS CASE WAS COMPLETE AND THERE IS NO BASIS FOR PETITIONER'S ASSERTION THAT THE COURT'S RULING MAY HAVE BEEN INDUCED BY AN INCOMPLETE RECORD

The Petitioner makes the unaccountable and untimely contention that the record on appeal was incomplete; and he implies that the alleged "missing pages" may have contained key testimony establishing an alleged conspiracy between the Respondents.

Any rational and fair-minded reading of the pertinent portions of the Transcript (which has not been filed with this Court) reveals an unbroken continuity. There are no omitted pages but only, in several instances, a harmless misnumbering.

Any further discussion of this point would tend to be wasteful of this Court's time.

III

CLEARLY THERE IS A RIGHT TO A JURY TRIAL IN AN ACTION FOR MALICIOUS PROSECUTION BUT THAT RIGHT HAS NOT BEEN VIOLATED BY THE SIXTH CIRCUIT IN THIS CASE; MOREOVER, THE COURT NEITHER DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS NOR DID IT DEPART FROM ANY OF ITS OWN PREVIOUS DECISIONS OR THOSE OF OTHER CIRCUITS

Petitioner cites *Smoot* v. *Fox*, 353 F.2d 830 (6th Cir., 1965) for the point that "[a]n action for malicious prose-

cution falls well within the recognized forms of action at common law." *Id.* at 833. This case is only relevant insofar as it holds there is a right to a jury trial in a malicious prosecution case. However, the holding of the Sixth Circuit is in no way in conflict with this. As pointed out in Argument I, above, when a court grants a directed verdict or a judgment notwithstanding the verdict it does not violate one's right to a jury trial. This decision is not in the least in conflict with *Smoot* v. *Fox*, supra, or with cases in any other circuit. In fact, the Sixth Circuit, as recently as 1968, has vacated a verdict for the plaintiff in a malicious prosecution suit and remanded for entry of judgment for the defendant based on the defense of advice of counsel. *Taylor* v. *Shepherd*, 391 F.2d 263 (6th Cir., 1968). In *Taylor* v. *Shepherd* the Sixth Circuit properly reversed the jury verdict for the plaintiff because they found, as here,

> "* * * that there is no evidence from which the jury in the instant case could properly have found failure on the part of appellant fully and fairly to disclose the material facts to his attorney * * * Appellant's motion for a directed verdict should have been granted."

Id. at 264.

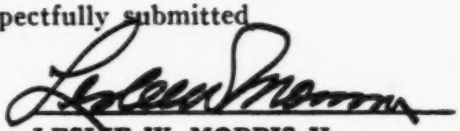
In any event, advice of counsel was not the only defense relied upon. The Sixth Circuit correctly held that there was a lack of sufficient proof on all of the elements necessary to sustain Petitioner's cause of action.

CONCLUSION

The decision of the Court of Appeals, Sixth Circuit, is clear and correct. The Petitioner failed to set forth any reason for this Court to exercise its discretion to grant a review on writ of certiorari. This case does not involve constitutional questions or federal law but turned upon the application of Kentucky law to the facts of the case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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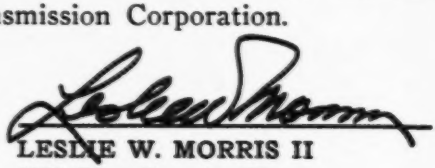
CERTIFICATE OF SERVICE

It is hereby certified that on the 28 day of May, 1974, three copies (each) of this printed brief were served upon Hon. David C. Graves, Jr., 256 South Limestone, Lexington, Kentucky 40508, Hon. Jean L. Auxier, First National Bank Building, Pikeville, Kentucky, and Hon. Leer Buckley, 502 Security Trust Building, Lexington, Kentucky 40507, attorneys for Emmett C. Worley, Petitioner; and upon Hon. H. Raymond Andrews and Hon. Thomas E. Morgan. P. O. Box 1273, Charleston, West Virginia 25325, and Hon. Joseph L. Arnold, First National Bank Building, Lexington, Kentucky 40507, attorneys for the other two Respondents, Columbia Gas of Kentucky, Inc. and Columbia Gas Transmission Corporation.



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